

Book Review

"O Madness of Discourse, That Cause Sets Up with and Against Itself!"

—William Shakespeare, *Troilus and Cressida*,
act v, scene 2, line 143

Causation in the Law. By H.L.A. Hart* and Tony Honoré.** *Oxford University Press*. 1985. Pp. lxxxi, 516. \$34.50 cloth, \$19.95 paper.

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Consider the second edition of a book which has exercised great influence upon the discussion of fundamental questions of law and philosophy. *Causation in the Law*, by H.L.A. Hart and Tony Honoré, first published in 1959, has reappeared to haunt a new generation of scholars.¹ It is a truly formidable work, setting standards of scholarship and insight in a field notorious for its difficulty, standards which have not been, and probably never will be, surpassed. Nevertheless, the first edition of the book has generated a good deal of critical comment over the last quarter century.² Courts on both sides of the Atlantic have meanwhile yielded a de-

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1. H.L.A. HART & T. HONORÉ, *CAUSATION IN THE LAW* (2d ed. 1985) [hereinafter *CAUSATION*; references are to second edition unless otherwise stated].

2. See, e.g., T. BEAUCHAMP & A. ROSENBERG, *HUME AND THE PROBLEM OF CAUSATION* 288-300 (1981) (discussing Hart & Honoré's implications for Hume); A. BECHT & F. MILLER, *THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES* 153-223 (1961) (disputing Hart & Honoré's insistence on role of normative judgments in causation); A. HARARI, *THE PLACE OF NEGLIGENCE IN THE LAW OF TORTS* 50-56 (1962) (arguing causation cannot be treated as distinct issue from negligence); R. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* 87-117 (1963); H. MCGREGOR, *THE LAW OF DAMAGES* 71-72 (1980); J. MACKIE, *THE CEMENT OF THE UNIVERSE* 44-48, 117-36 (paperback ed. 1980); A. PECZENIK, *CAUSES AND DAMAGES* 186-87 (1979) (agreeing with much of Hart & Honoré while accepting strong version of causation rejected by them); H. STREET, *LAW OF TORTS* 142 (6th ed. 1976) (Hart and Honoré "take[] insufficient account of the

cent crop of puzzling, and sometimes bizarre, cases.³ Hart and Honoré therefore had plenty of scope for revision, rejoinder, and new reflection. This review aims to assess these new contributions in light of the debate on causation as it now stands.

After placing the causation debate in a wider context, I shall move on to a recapitulation of the essentials of Hart and Honoré's thesis and a review of some fundamental objections to it. Thereafter, by way of a running commentary rather than a structured argument, I look at their attempt, new to the second edition, to specify the relationship between causal and non-causal issues in the law.

blending of questions of causality and policy in judicial decisions"); Cole, *Windfall and Probability: A Study of "Cause" in Negligence Law* (pt. 1), 52 CALIF. L. REV. 459, 466-71 (1964) (criticizing Hart & Honoré's emphasis on "common-sense notions"); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 181-84 (1973) (criticizing Hart & Honoré's view of intentional, intervening acts); Fleming, *The Passing of Polemis*, 39 CAN. B. REV. 489, 509 n.70 (1961) (assailing lack of legal realist viewpoint in Hart & Honoré); Gorovitz, *Causal Judgments and Causal Explanations*, 62 J. PHIL. 695, 698-700 (1965) (suggesting minor refinement to Hart & Honoré thesis); Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 565-69 (1962) (admitting usefulness of Hart & Honoré analysis, but claiming much of it not about causation); Mansfield, *Hart and Honoré, Causation in the Law—A Comment*, 17 VAND. L. REV. 487 (1964); Williams, *Causation in the Law*, 1961 CAMBRIDGE L.J. 62 (1961) (discussing first edition of CAUSATION in light of judicial support for foreseeability test); Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735 (1985) (criticizing Hart & Honoré's analysis on numerous grounds); Boberg, Book Review, 78 S. AFR. L.J. 120 (1961) (praising Hart & Honoré's thoroughness); Brett, Book Review, 3 MELB. U.L. REV. 93, 95-96 (1961) (criticizing Hart and Honoré's refusal to say a case is wrongly decided); Childres, Recent Book, 32 MISS. L.J. 222 (1960-1961) (*Causation* a "monumental" work); Cooperrider, Recent Book, 58 MICH. L. REV. 951 (1960) (noting intuitive appeal of *Causation's* approach); Coutts, Book Review, 23 MOD. L. REV. 708 (1960) (calling *Causation* "brilliant"); De Wet, Book Review, 1962 ACTA JURIDICA (University of Cape Town) 139 (arguing much of Hart & Honoré's approach is tautological); Hancock, Book Review, 6 NAT. L.F. 143 (1961) (presenting minor quibbles in generally favorable review); Leflar, Book Review, 75 HARV. L. REV. 1691, 1693-94 (1962) (generally criticizing analyses, including Hart and Honoré's, that insist on determinative causation models); Nokes, Book Review, 9 INT'L & COMP. L.Q. 353 (1960) (praising *Causation's* argument while criticizing its style); White, Book Review, 60 COLUM. L. REV. 1058 (1960) (Hart and Honoré "brilliantly" discuss causation); Tunc, 1956 D.S. Jur. 354, 355 (note) (citing Hart and Honoré articles published before *Causation*, 1st ed.).

In view of the length and breadth of this list, consider the following comment: "Hart's and Honoré's important work on causation . . . despite the elegance and persuasiveness of [its] analysis . . . has had no discernible influence on contemporary tort theorists . . ." Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419, 425 n.17 (1979).

3. See, e.g., *Baker v. Willoughby*, 1970 A.C. 467; *Home Office v. Dorset Yacht Co.*, 1970 A.C. 1004; see also *Peri v. Camden L.B.C.*, [1984] 1 Q.B. 342; *Jobling v. Associated Dairies Ltd.*, [1981] 2 All E.R. 752 (H.L.); *McGhee v. National Coal Bd.*, [1973] 1 W.L.R. 1; *McWilliams v. Sir William Arrol & Co.*, [1962] 1 W.L.R. 295; *Meihost v. Meihost*, 29 Wis. 2d 537, 139 N.W.2d 116 (1966); cf. *Davis v. Thornton*, 384 Mich. 138, 180 N.W.2d 11 (1970); *Regina v. Blaue*, [1975] 3 All E.R. 446; *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980); *Tremain v. Pike*, [1969] 3 All E.R. 1303; *Overseas Tankship Ltd. v. Morts Dock & Eng'g Co.*, 1961 A.C. 388 (*The Wagon Mound No. 1*); *Overseas Tankship Ltd. v. Miller Steamship Co.*, [1967] 1 A.C. 617 (*The Wagon Mound No. 2*). For an example from the other side of the Pacific, see *Boyd v. State Gov't Ins. Office*, 1978 Q.R. 195; see also *Government of Papua New Guinea v. Moini*, 53 AUSTR. L.J. 19 (1979) (case comment).

I. THE POLITICS OF CAUSATION

Before taking up in some detail the criticisms of *Causation in the Law*, together with Hart and Honoré's responses, I should address a larger question. Why should anyone care about such an esoteric subject? Or what, if anything, is at stake in the seemingly endless war by hypothetical that has now developed?

One's views on causation, one's views on how the law in a specific area (usually torts) ought to look, and one's general political, moral, and philosophical commitments used to have very little to do with one another. There was some logic to the distribution of views, but it was more cultural than political. Leon Green and his followers were classical American realists. Their views on causation and torts were based on fairly clear principles. They had no faith in the power of rules or other verbal formulations to restrain the judiciary or to achieve justice.⁴ They did believe, however, that institutions—especially the courts as a combination of judge and jury—could achieve something like justice, if only they avoided rigid thinking and faced difficult decisions with candor and a clear head. Hart and Honoré, by contrast, but in common with much of English legal thinking this century, had much more faith in words than in courts. Uncontrolled judicial discretion was greatly to be feared,⁵ and though to some extent inevitable, it could be minimized by carefully drafted verbal rules. As for social policy, it was clearly beyond the capabilities, and the jurisdiction, of the courts.⁶ Although to an American these views would have sounded conservative, and indeed Hart and Honoré's methods and conclusions are conservative, their approach had as much resonance on the left of British politics as on the right.⁷

The connection between legal views and political views has become decidedly firmer since Richard Epstein started to expound his views in 1973.⁸ Put very crudely, Epstein advocates a system of strict liability based almost entirely on a concept of "causing harm." For this project to

4. See, e.g., Green, *supra* note 2, at 568 (although no one would agree with merely "intuitive" judgments from judges, the influences that in fact prevent this are not all "rules"). "I think it safe to say that no rule or formula can be written that can ever be depended upon to supersede the power of enlightened judges to meet the responsibility that the environment in its totality imposes upon a court." *Id.*

5. CAUSATION at 4-5, 292, 298, 436.

6. *Id.* at 285.

7. See generally J. GRIFFITH, *POLITICS OF THE JUDICIARY* 52 (1977) (stating conventional view of British left—that judiciary, and thus law itself, is hopelessly biased in favor of rich and powerful). For Hart's political views ("social democratic"), see N. MACCORMICK, *H.L.A. HART* (1981).

8. See Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979) [hereinafter Epstein, *Causation and Corrective Justice*]; Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979) [hereinafter Epstein, *Nuisance Law*]; Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Epstein, *supra* note 2.

work, Epstein needs not only a justifiable model of rights to define "harm" but also a strong and coherent notion of causation. Although he makes a plausible claim to have drawn inspiration from Hart and Honoré, Epstein's view that causation is determinative of all the relevant issues ("causal maximalism") receives little sympathy from them in the Preface to the second edition of *Causation in the Law*.⁹ They give him credit only for making some telling points against the risk theorists¹⁰ and the new champions of "causal minimalism," the economists.¹¹

"Causal minimalism" is the view that there is nothing, or virtually nothing, of importance in causal issues. The extreme view, favored by some economists,¹² is that the defendant and plaintiff are usually equally "responsible" in a but-for cause sense (if the plaintiff had not been on the road, the defendant would not have run into her), and so causation is usually of no consequence. Once the defendant's conduct is established as a but-for cause, all other issues are about the distribution of costs. Guido Calabresi¹³ gives more attention than other economists to causation, but Hart and Honoré classify him as a "minimalist" as well. Apart from but-for cause, his analysis concerns extreme probability (his "causal link"), which Hart and Honoré deny is causal,¹⁴ or else proximate cause, which turns out to be a matter of assigning responsibilities in furtherance of a range of policies.¹⁵

In contrast to Hart and Honoré, Epstein has no particular desire to describe the law as it is.¹⁶ If the courts do not follow his theory, then his reply is that they should. More importantly, his views are explicitly founded on a political philosophy which might properly be called a form of libertarianism.¹⁷ The tenet of this philosophy apparently most relevant

9. CAUSATION at lxxiii-lxxvii.

10. The "risk theory" is the idea that liability should extend as far, but only as far, as claims for types of harm of which the chance or risk constituted either *the* reason or *a* reason for the imposition of liability. See generally James & Perry, *Legal Cause*, 60 YALE L.J. 761 (1951); Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 90-93 (1942).

11. As for Epstein's particular account of causation, Hart and Honoré reject it as "crude and inflexible." CAUSATION at lxxvii. Indeed even, or perhaps especially, among supporters of Epstein's project there is dissatisfaction with his approach to the causation question. Much of the best work now being carried out on the technicalities of causation is being done by those who are motivated by a desire to save the Epstein project. Wright, *supra* note 2, at 1827-28, clearly falls into this category.

12. See, e.g., Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 37 (1960).

13. See, e.g., Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).

14. See *infra* text accompanying note 37.

15. CAUSATION at lxxii-lxxiii.

16. But, as Posner says, Epstein at least creates the impression that his theory has merit as a description. Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457, 457 n.1 (1979). What Epstein describes, however, is certainly not the positive law of England, nor of any Western European state that I know.

17. See Epstein, *Causation and Corrective Justice*, *supra* note 8, at 488-90, 497. He does claim not to be an *uncompromising* libertarian, *id.* at 490, but the subtleties of this pronouncement are hard

to the law of torts is that the law, and the state in general, has no business trying to establish or maintain any particular distribution of benefits and burdens in society.¹⁸ The only sort of justice in which the state should deal is "corrective justice"—a concept Epstein claims to borrow from Aristotle.¹⁹ Corrective justice is backward-looking and aims only to restore the previous balance between the parties. This is in contrast, and is supposed to be incompatible, with the "forward-looking" approach of the economists who want the law to take into account both its potential deterrent effects on people not involved in the suit at hand and its general effects on the allocation of resources. Epstein thus differs from those, such as Dean Calabresi, who openly acknowledge the place of both deterrence and distributive justice in their thinking about torts in general and causation in particular.²⁰

The faint praise Hart and Honoré give to Epstein²¹ makes it clear that they do not share his reductionist view of justice. If one combines Hart and Honoré's apparent moderation with their view that the courts are not very good at social policy, then one can conclude that they hold the commonplace British opinion that the courts are for rectificatory justice while Parliament is for distributive justice. In Britain, unlike the United States, the distributive branch is supreme.²²

to comprehend.

18. *Id.* at 488; see also Borgo, *supra* note 2, at 452 n.51 (defining "social value" as willingness to pay). But see Epstein, *Causation and Corrective Justice*, *supra* note 8, at 497 n.63 (making some concession to legislative activity).

19. "The traditional 'corrective' is unfortunate, because it suggests moral correction, whereas the object of this kind of justice is merely adjustment." *THE ETHICS OF ARISTOTLE* 179 n.2 (J.A.K. Thomson & H. Tredennick trans. rev. ed. 1976) [hereinafter *ETHICS*]. This term is usually translated as "rectificatory" justice these days.

20. See, e.g., Calabresi, *supra* note 13; Borgo, *supra* note 2, at 454.

21. "[T]ort cannot be accounted for solely as [a forward-looking instrument]. Backward-looking aims . . . play at least some part in it . . ." *CAUSATION* at lxxv (emphasis added).

22. Before leaving this topic two things should be noted. As Posner, and Hart and Honoré, point out, Aristotle's rectificatory justice was based on fault, not strict liability. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 189-92 (1981); *CAUSATION* at lxxv. In any case, for Aristotle rectificatory justice presupposed distributive justice. That is, although according to Aristotle distributive justice does not require absolute equality, and it is therefore possible for a transaction between unequals to be just, it is not possible to have a just transaction in an unjust society:

Political justice obtains between those who share a life for the satisfaction of their needs as persons free and equal, either [absolutely or relative to their value as citizens]. Hence in associations where these conditions are not present there is no political justice between the members, but only a sort of approximation to justice.

ETHICS, *supra* note 19, at 188 (1134a23-b8), (footnote incorporated into text). The reconciliation in real social institutions of distributive and rectificatory justice is, admittedly, difficult. But, reducing one to the other merely creates worse problems. How can a society in which great distributional inequality persists, albeit from supposedly "unforced" transactions, be called "just"? Similarly, what is "just" about a society in which some people can renege on promises, fail to carry out duties and generally do harm to others?

For one solution of some authority, see *Leviticus* 25:6, 10, 39-55 (prescribing roles for treatment of servants in discussion of "jubilee"); see also J. YODER, *THE POLITICS OF JESUS* (1972) (drawing on

The technical debates about causation therefore have taken on a new meaning. It is important to know how much weight the best possible causation model will bear. Can it support the whole of the law of obligations by itself, Atlas-like, in which case the Epstein project remains plausible? Or is its strength wholly illusory, a matter of smoke and mirrors which it is necessary to see through in order to see what really holds up the legal edifice? Hart and Honoré believe that both of these positions are false. But in order to say whether we should concur with them, we have to subject their model of causation to the most rigorous scrutiny. This means engaging fully in the technical debates themselves.

II. COMMON SENSE AND CAUSATION: A RECAPITULATION

As several reviewers of the first edition of *Causation in the Law* remarked,²³ there is far too much in the book, indeed in each sentence, for any précis to be adequate. All I intend to do in this section is provide a few reminders of some of its main themes. The overall structure of the first edition has been retained in the second, and so for the most part I shall postpone discussion of the differences between the two until later.

The most insistent of the book's themes is that certain views seriously underestimate the autonomy and importance of causal argument in law.²⁴ In general, these theories hold that the only truly causal question relevant in law is: "Would the harm of which the plaintiff complains have occurred if the defendant had acted lawfully?"²⁵ (or, a different test, "Would the harm have occurred but for the defendant's conduct?"²⁶). All other questions that are sometimes couched in causal terms, for example "proximate cause" or "remoteness," are, according to these views, in reality matters of legal policy: Was the harm within the risk envisaged by the legal rule?²⁷ Should the law recognize that this sort of defendant owed a duty to this sort of plaintiff?²⁸ Should the defendant be liable for this sort of harm?²⁹ Would the harm have been foreseeable for reasonable people?³⁰ Some writers, especially those who formulated the cause-in-fact

A. TROCME, *JESUS-CHRIST ET LA REVOLUTION NON-VIOLANTE* (1961)).

23. See, e.g., Childres, *supra* note 2, at 222-23; Green, *supra* note 2, at 543-44.

24. CAUSATION at xxxiv-xxxv, lxvii-lxxviii.

25. See, e.g., A. BECHT & F. MILLER, *supra* note 2, at 179 (criticizing Hart & Honoré for not dealing with "negligent segment" of defendant's conduct). See generally *id.* at 171-86; Wright, *supra* note 2, at 1766-74.

26. See, e.g., Green, *supra* note 2, at 549 n.11. Note also the discussion of the similar problem in German theory of "elimination with substitution" versus "simple elimination." CAUSATION at 453 n.34.

27. CAUSATION at 6, 13, 265, 284-90.

28. See, e.g., Green, *supra* note 2, at 546, 548.

29. Dias, *Trouble on Oiled Waters: Problems of The Wagon Mound* (No. 2), 1967 CAMBRIDGE L.J. 62, 66.

30. *Id.*

question in terms of whether the damage would have occurred if the defendant had acted *lawfully*, even doubted whether any causal questions could be asked free of policy, or at least normative, considerations.³¹

Although they admit that these theories do have some advantages, for example making explicit the importance of the scope of particular rules, Hart and Honoré have one central objection to them. To accept theories of causation requiring only but-for cause is, they claim, to commit oneself to a usage of the word "cause," both as a verb and as a noun, that does not correspond to ordinary usage, indeed that strains ordinary usage to an unacceptable degree. Even if legal analysis requires a language more refined than the everyday, it should start with and constantly refer back to ordinary usage.³²

A. *Basis and Departure from Hume and Mill*

Hart and Honoré's own account of causal language, which they claim approximates "common sense" and ordinary usage, both in the law and outside, starts out, anomalously perhaps, from the work of two philosophers, David Hume and John Stuart Mill.³³ They accept Mill's doctrine, which derives from Hume, that particular causal statements such as "X caused Y" are not only supported by general statements about a rule-like sequential relationship between X's and Y's, but also imply them. That is, it makes no sense to say "X caused Y" when one cannot point to a true general rule that "X's are followed by Y's." Furthermore, Hart and Honoré agree with Mill that the best way to approach these relationships is in terms of complex sets of conditions being jointly sufficient for a result, rather than in terms of necessity or sufficiency of each condition considered separately. For Mill, what "causes" an event is the whole set of conditions that as a combination is sufficient for its occurrence, not just the event that immediately preceded it. "Necessity" in the first instance is a matter of the relationship between one condition and the complex and sufficient set of conditions.³⁴ A condition is necessary if without it the whole set of conditions present would cease to be sufficient. Lastly, they accept Mill's doctrine of the plurality of causes, which says that distinct sets of conditions may be sufficient for the same result, both on a particular occasion and in general.

Hart and Honoré depart, however, from Mill at several crucial

31. See, e.g., Cole, *supra* note 2; Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60 (1956). See generally Wright, *supra* note 2, at 1738-39, 1742-45 (reviewing Malone, *supra*).

32. CAUSATION at xxxiv, 1-4.

33. *Id.* at 12-25.

34. *Id.* at 112-13; see Wright, *supra* note 2, at 1789.

points.³⁵ First, they consider Mill's requirement that a causal regularity must be "invariable and unconditional" to be too strict to support a particular causal statement.³⁶ They emphasize that if one is seeking an explanation for an event that has already occurred, which is usually the case in law, as opposed to predicting future events, one is relieved of the need for absolute certainty about the results of the conjunction of the events in question. *Ex hypothesi* it resulted in the event one seeks to explain. Therefore, claim Hart and Honoré, one does not require generalizations about the precise set of circumstances as a set. An explanation is complete even if the set is broken down into a sequence of discrete events each of which exemplifies a broad generalization. For example, if someone drops a brick from a building and injures a passerby, one need not have been able to predict the injury in advance to be in a position to say that the injury was caused by someone dropping a brick. It is not necessary to show that whenever bricks are dropped in these circumstances, injuries ensue. It suffices to point to the generalizations that things fall when they are dropped, and that a heavy object falling from a sufficient height will cause injury if it hits someone. These generalizations are, of course, trite and platitudinous—they go without saying. As Hart and Honoré would say, they are a matter of common sense.

Note, however, that Hart and Honoré would not accept generalizations in the form of statements of probability, such as "a short circuit very frequently causes fire." This means only that on a number of particular occasions short circuits have caused fires. It is not inconsistent with a short circuit not causing a fire on another particular occasion. We are committed only to the possibility that short circuits cause fires, not to the assertion that they do. If we were otherwise committed, in every case where a short circuit was not followed by a fire, we would have to offer a specific explanation distinguishing this case from others in order to preserve the generalization.³⁷

In one case Hart and Honoré reject the need to show a general causal regularity altogether. This is where we are concerned not with physical events but "interpersonal transactions," where the words or deeds of one person are said to cause another person to act or to result in the actions of another person. This occurs, for example, where X "induces" or "persuades" or "forces" Y to do something.³⁸ They argue that we accept statements like "Y did A because of threats by X," or "because of the reasons put forward by X," even though we know that, on another occasion under

35. CAUSATION at 22-25.

36. *Id.* at 28-32.

37. *Id.* at 48-49.

38. *Id.* at 51-59, 187-94 (wrongful acts).

identical conditions, Y might act differently. Hart and Honoré could again say that since explanation is different from prediction, one needs only broad generalizations; one need not look at the whole set of circumstances, but instead could reduce what one sought to explain to a sequence of events. But here this move does not work. Certainly, one can “understand” people acting for a particular reason, in the sense that if they had not believed in or accepted the reason they would have acted differently. The problem is that one can also conceive of the same people in the same circumstances believing in the reason, but deciding not to act on it. One might describe such conduct as “irrational,” but the possibility of it happening cannot be ruled out—unlike, for example, the possibility of a dropped brick not falling. Therefore, even “broad” generalizations are not possible. In other words, human consciousness and choice, although often constrained, cannot be reduced to causal laws.

In a similar way, when we speak of X providing Y with an opportunity³⁹ to do A, or robbing Y of the opportunity to do B, we need not believe that such opportunities are invariably taken. In this case Hart and Honoré for once admit the relevance of statements of likelihood (“people often do A in these circumstances”) and even of common morality (“it was proper of X to do A even though it gave Y the opportunity to do B”) in making “purely” causal judgments. An example of the relevance of likelihood is: you fail to deliver machinery to me. I lose profits. You say that you did not cause the loss because I might have failed to make a profit in any case (through bad marketing, for instance). Hart and Honoré say that I may reply that in normal circumstances I would make a profit and so you have caused a loss.⁴⁰ The relevance of common morality can be seen in the next two cases. First, X burgles Y’s office. X got in through a door unlocked by Z because of fire regulations. Second, P burgles Q’s house, having got in through a door that was left open by R, the housekeeper, to let a cat in and out of the house. Hart and Honoré’s point is that whether Z or R were justified in leaving the doors open is relevant to whether Z or R caused the loss to Y or Q.

Hart and Honoré’s most important departure from Mill is their refusal to follow him, in his strict or “scientific” theory, in restricting the use of “cause” to the complete set of “conditions” that are jointly sufficient for the result. In the name of ordinary usage they go even further, rejecting Mill’s account of a “popular” theory of causation. It turns out that Mill’s account is the same as the traditional academic legal orthodoxy, according

39. *Id.* at 59–61, 158–59, 194–200. The treatment of depriving others of opportunities has been expanded in the second edition. *See id.* at xxxiv.

40. “Loss of a chance” would be a better analysis. *See infra* text accompanying notes 123–125.

to which one or more of the "conditions" are "selected" by various means to be "causes."⁴¹

Hart and Honoré have a "popular" theory of their own. Ordinary usage, they claim, distinguishes between "causes" and mere "conditions." Both are "conditions" in the Millian sense, as modified by their criticisms. Mere conditions, however, are simply "part of the background," whereas causes stand out. Conditions are part of the "normal" course of events or state of affairs, whereas causes are abnormal, unusual events or states that make the difference between a particular unexpected result and things going on as usual.⁴² Thus, if I am electrocuted by a defective television set, although my buying the set is a condition of my injury, it is not, according to Hart and Honoré, its cause. Rather, the cause is the unusual event, namely the defect. But if I am allergic to strawberries and fall ill when I eat them, the cause of my illness is the allergy, not the normal background events of growing and selling strawberries.

The authors admit that what counts as a cause or a condition is neither fixed nor absolute. The dividing line changes according to both context and practicality.⁴³ As regards context, one would not, for example, in normal circumstances regard the presence of oxygen as the "cause" of a particular fire, even though it is always a necessary part of any set of events sufficient for a fire; one would say that oxygen was merely part of the background. If, on the other hand, a fire broke out in what was, perhaps for experimental reasons, supposed to be a vacuum, the presence of oxygen might well be said to have been the (or a) cause of the fire. A doctor, to take a more practical example, might properly say that the cause of a patient's illness was disease A (as opposed to disease B), and that the way in which the patient contracted the disease (for example, catching it from person X rather than person Y) was merely part of the background. The patient, on the other hand, could equally properly cite the circumstances in which the disease was caught as the (or a) cause of the illness.

B. *Solving Puzzles*

With this conceptual apparatus the authors investigate and analyze a number of notorious puzzles. Sometimes they draw mainly from their modified version of Mill; at other times they elaborate on their own popular theory. Examples of the former include their discussions of additional cause problems and license cases. The three-house-fire problem, for exam-

41. See CAUSATION at 31.

42. *Id.* at 28-41.

43. Context, according to the authors, describes the "normal" state of affairs of a given situation. Practicality refers to the practical interest of the parties who are perceiving causes and their effects. *Id.* at 35-37 (examples).

ple, in which two fires, one in each of two houses, combine to burn down a third house, is an additional cause problem, as is the firing squad problem, where two people simultaneously shoot a third. The question is on what grounds can both the fire-starters or all the shooters be said to have caused the result when it would have made no difference if any one of them had not acted. A license case is one where X engages in an activity without a permit required by law—piloting a ship, for instance. Without otherwise being at fault, X's activity results in damage to Y. Should X be held liable even though absence of the license made no difference?

Both additional cause and license cases are considered in a chapter that criticizes the traditional "sine qua non" or "but-for" formulation, and demonstrates the superiority of the authors' view, based on Mill's "plurality of causes" doctrine. Mill's doctrine holds that the minimum requirement for causal relevance of a condition is that the condition be necessary to make some imaginable set of conditions sufficient for the result in the circumstances, even though the set itself may not be necessary for the result on the particular occasion.⁴⁴ Thus, the presence of other sufficient causes is irrelevant to whether or not a particular event is a cause.

Among the elaborations of Hart and Honoré's own popular theory are discussions of what are traditionally called "remoteness" issues—*novus actus interveniens*, for example—where the question is whether an extraneous event, which happened after the defendant's conduct, but before the plaintiff suffered harm, "breaks the chain of causation" and thus exonerates the defendant. Their claim is that when two possible "causes" meet the "makes a difference" test, ordinary usage requires that, when one act followed the other in time, the first in time be called the cause and the second be treated as part of the normal course of events unless the second was either a voluntary act or purely coincidental⁴⁵—as they define these terms.⁴⁶ Thus, when the intervening event is part of the "normal course of events" (given the defendant's conduct), it will not "break the chain."

Perhaps incongruously, the terms "voluntary" and "coincidental" are defined technically, without much attention to ordinary usage. "Voluntary" bears its Aristotelian sense: an act free from physical compulsion, ignorance, and error, free from the pressure of moral and legal obligation, and free from having to choose between two evils.⁴⁷ The second event only

44. *Id.* at 109–29; cf. Wright, *supra* note 2, at 1788–1803 (describing necessary element of sufficient set test).

45. CAUSATION at 68–81.

46. See *infra* text accompanying notes 47–51.

47. CAUSATION at 41 & n.12; see also *id.* at 136–62. In response to criticism, see, e.g., Mansfield, *supra* note 2, at 510–17, Hart and Honoré have changed the definition of voluntariness in the second edition. They no longer require that the act must be intended to produce the consequence that is in fact produced, but only that the actor intended "to exploit the situation created by the defendant, i.e.

counts as a "coincidence" if its occurrence in conjunction with the first event is "very unlikely by ordinary standards,"⁴⁸ if it occurs "without human contrivance,"⁴⁹ and if it is causally unconnected with the first event. Thus, if X pushes Y to the ground and at that moment a tree falls on Y with fatal results, one might say that the death came about because of a coincidence; but if X pushes Y into the tree and a branch that is shaken free falls onto Y, this, being causally connected, would not count as a coincidence. Furthermore, the "eggshell skull" rule⁵⁰ is explained by a somewhat ad hoc principle to the effect that states of affairs persisting throughout the period when the event happens, no matter how unusual, cannot count as coincidental.⁵¹

Both modified Mill and ordinary usage come into play in the direct assault on the assorted "risk"⁵² and "foreseeability"⁵³ theorists.⁵⁴ Modified Mill helps refute the argument that even "cause-in-fact" is bound up with issues of policy, since the sine qua non test cannot deal justly with obvious problems such as the three-house-fire case. In fact, the three-house-fire problem does not defeat any theory that accepts the doctrine of the "plurality of causes."

- The ordinary usage strand is used to show that the risk theories draw the dividing line between causal and non-causal issues in the wrong place: they characterize as non-causal, and thus as matters of policy, issues

to treat it as providing the opportunity or occasion for a certain course of conduct." CAUSATION at 136 n.23. Wright, *supra* note 2, at 1746 n.31, claims that this new definition can only be part of Hart and Honoré's analysis of intervening events ("the proximate-cause inquiry" as he calls it), but not of their analysis of what can count as a "cause" as opposed to a "condition" (the "tortious-conduct inquiry"). He says that this is because the latter "evaluates the conduct of the defendant herself." This might be true if one takes the new requirement absolutely literally ("the situation created by the defendant") but surely this is not necessary; "intended to exploit the situation as it existed" would suffice. Wright goes on to criticize the new requirement wherever it appears, for "unless it is interpreted to require that the intervenor be aware of the 'untoward' risks involved in the situation . . . and that the intervenor deliberately (tortiously) act to exploit those risks . . . any voluntary action affecting the situation . . . would be a superseding cause." *Id.* But from the examples Hart and Honoré give, CAUSATION at 137 (defendant wrongfully renews drug prescription and decedent deliberately acts to commit suicide; plaintiff returns to England from Australia to be with family during convalescence and defendant not chargeable with cost because trip was plaintiff's "own choice, not . . . medically necessary"), it is clear that the intervening act need not be tortious, and need not have to do with "risks" in the ordinary sense. In fact, Hart and Honoré come very close to saying that voluntary acts (in their own narrow sense) do indeed constitute superseding causes.

48. CAUSATION at 78.

49. *Id.*

50. The "eggshell skull" rule holds that if the defendant has been negligent, it is no excuse that plaintiff suffers in an unexpected way because of some unusual pre-existing condition (for example, an eggshell skull). The defendant has to pay damages to compensate the plaintiff in full, not just for the harm that would have been suffered by an average person. In short, defendants take plaintiffs as they find them.

51. CAUSATION at 79-80.

52. See *supra* note 10.

53. See *supra* text accompanying notes 24-30.

54. CAUSATION at xxxiv, li-liii, 6-7, 254-90, 465-97.

which, according to Hart and Honoré, are really causal. For example, the "ordinary usage" of "cause" can sensibly distinguish between the two cases of X pushing Y.⁵⁵ Therefore, say Hart and Honoré, there is no need to talk about "policy" matters, such as the distribution of risk. Furthermore, since voluntary acts "break the chain of causation," as a matter of common sense one need not plunge into the morass of "reasonable foreseeability" to solve cases of third-party intervention.

At least a third of the book is devoted to the authors' analyses of case law in not only Great Britain and the United States, but also Australia and South Africa, Germany and France. Most of the revisions for the second edition stem from the new cases of the last twenty-six years.⁵⁶ But despite the intervening case law, the authors' attitude towards judges is markedly different from their attitude towards academics. In the tradition of English academic timidity, which usually masquerades as humility, Hart and Honoré use their theory not to criticize judicial pronouncements but only to "explain" them.⁵⁷ That is, for the most part they arrange their thoughts so that they will agree with the judge (and indeed, when left with little to complain about in a rival academic theory, they do not hesitate to castigate it for not being in line with authority).⁵⁸ When they are unable to agree with a judge's remarks, they take great pains to justify the result of the case in their own terms.

There is, however, a benefit which sometimes accrues to those who will

55. See *supra* text following note 49.

56. See *supra* note 3. The most important discussions are those of *The Wagon Mound* (No. 1) (CAUSATION at 174, 255-56, 269, 274-75, 283, 320), *Sindell v. Abbott Laboratories* (*id.* at 424), *McGhee v. National Coal Bd.* (*id.* at 102, 410), *Baker v. Willoughby* and *Jobling v. Associated Dairies* (*id.* at 247-48). Regarding *Wagon Mound*, which Glanville Williams hailed as the adoption of the risk theory by the highest court of the British Commonwealth, see Williams, *supra* note 2, at 70-71, Hart and Honoré joyfully join those who say that its only effect is to make foreseeability of the type of harm relevant to defendant's responsibility as well as his negligence, and that it has left the causation-based eggshell-skull rule untouched. CAUSATION at 225, 275. *Sindell* and *McGhee* they see as dispensing with the causation requirement altogether. *Id.* at 410, 424. For other possible interpretations of *McGhee* and the test of materially increasing a risk, see *infra* text accompanying notes 120-129. Concerning *Baker* they fail to make clear that the plaintiff did not recover from the defendant for the additional damage caused by the second tortfeasor, but on the whole they agree with other writers, see, e.g., Fraser & Howarth, *More Concern for Cause*, 4 LEGAL STUD. 131, 137 (1984), that the case was really more about compensation than causation. CAUSATION at 247. They justify *Jobling* on the ground that "policy" does not require that the defendant guarantee the plaintiff against subsequent illness where the intervention is not tortious. *Id.* at 248. They do not specify what exactly this policy is.

57. Examples of this deference are innumerable. Indeed, the authors state that they are seeking "to understand rather than to manipulate the principles of legal responsibility." *Id.* at 132. Is this consistent with a sentence that starts, "But in outline if the views advocated in this book are accepted . . ."? *Id.* at 428. See Brett, *supra* note 2, at 95-96 (noting lack of criticism of cases).

58. For example, Keeton's views are dismissed with the remark, "[i]t suffices to note here that at least one American case decides that a defendant may be liable for harm caused by his violation of a regulation even though the harm was not 'within the risk' which made it wrongful to commit the violation." CAUSATION at 289; see also *id.* at 304 ("[t]hese results may be found satisfactory by some but they are without support in existing law").

never say that a judge is wrong, and that is a new, useful distinction. Hart and Honoré have had to explain why, since their first edition, there has been a tendency in virtually all jurisdictions to find liability despite a voluntary or coincidental intervening act (most notably in their category of negligently providing another with opportunities to harm the plaintiff, such as allowing a drunken driver to borrow one's car).⁵⁹ Their explanation is that the courts are developing a new sort of liability in which causation is replaced by the lesser requirement that the defendant's conduct be causally relevant in their modified Millian sense. Following Hume, though perhaps not contemporary usage, they call this "occasioning harm."⁶⁰ To an outside observer, this new ground of liability without causation sounds very similar to some versions of the risk theory.⁶¹ But Hart and Honoré's story is that, while the risk theory is gaining acceptance in a limited number of situations, it still does not express in any way the "meaning" of causation throughout the law.⁶²

III. ORDINARY LANGUAGE AND COMMON SENSE

The most obvious, but also the most fundamental, way of attacking Hart and Honoré is to question their method. Why should we care whether the speech of lawyers accords with the speech of other people? So what if the law cannot be squared with common sense? Did not Coke inform James I that law was not natural but artificial reason?⁶³ Was it not once common sense that the Earth was flat? More seriously, if ordinary usage is to be the measure of right and wrong, does it not follow that all innovation in thought, and thus in language and every aspect of life, is to be condemned—at least until it becomes the new orthodoxy?⁶⁴

A critique of method is a more thoroughgoing criticism than merely announcing, as some critics have, that they do not share Hart and Honoré's intuitions about the usage of a particular term, or the correct way to characterize a situation, or the right answer to a hypothetical.⁶⁵ Such disagreement could be seen as merely part of the process of an academic

59. See generally *id.* at 59–61, 80–82, 194–250.

60. *Id.* at xiv–xlviii, 26, 194–204.

61. For example, I own a store selling guns. I fail properly to secure the door, with the result that someone breaks in, steals a gun and uses it to shoot you. You sue me for negligence. Is it not the case that the strongest argument for liability is that the risk of someone breaking in, stealing a gun and using it to cause harm is precisely the risk which I am supposed to guard against by securing the door? See *supra* note 10.

62. CAUSATION at 204.

63. Case of Prohibitions, 12 Coke 63 (1607). Sadly, lawyers' language protects lawyers not only from the state, but also from the lay populace. The two are inseparable in democratic society.

64. See generally Edgeworth, *Legal Positivism and the Philosophy of Language: A Critique of H.L.A. Hart's 'Descriptive Sociology'*, 6 J. LEGAL STUD. 115 (1986).

65. See, e.g., J. MACKIE, *supra* note 2; De Wet, *supra* note 2; Mansfield, *supra* note 2.

community's philosophizing about ordinary language. After all, the empirical base for assertions about what the "plain man" or "ordinary woman" would find an unnatural use of language is usually very narrow—a few friends, fellow diners at High Table, perhaps the occasional student. Often the only way to find out whether or not an idea is common sense is to assert it as a fact and wait for reactions. Admittedly, Hart and Honoré are more vulnerable than most on such points, not only because they sometimes adopt plainly technical and non-standard definitions,⁶⁶ but also because they claim to be reporting on ordinary usages in languages of which they are not native speakers, such as German and American. It is difficult to see how they can identify the common sense of societies to which they do not belong.

Another related, although not identical, criticism is that if one really listened to ordinary speech, both in and out of the law, one would hear causal theories very different from the ones expounded by Hart and Honoré. Common expressions describe causes as "having potency" or "power," or "operating" or "coming to rest." Hart and Honoré dismiss such expressions as "obscure metaphors."⁶⁷ John Mansfield, by contrast, points out how they fit neatly into German "individualizing" theories,⁶⁸ of which the two main characteristics are a denial of any need to relate the causality of particular events to generalizations and an assertion of the possibility of comparing the causal import of different events.⁶⁹ These theories have as strong a claim to be "common sense" as the theories of Hume, Mill, and Mackie. British empiricism may well be common sense in Oxford, but Aristotle's physics may be second nature in Heidelberg.

The only reply to this last point in *Causation in the Law* is that judicial users of "individualizing" theories sometimes find that such theories "break down" and that the results eventually achieved are consistent with the Hart and Honoré theory.⁷⁰ But they also admit that there are points at which their own theory "breaks down" and that the results are consistent with risk and probabilistic theories.⁷¹ In neither case does it follow

66. See, e.g., *supra* text accompanying note 47 (discussing definition of "voluntary").

67. CAUSATION at 442; see also *id.* at 14–15, 30, 73–74.

68. Mansfield, *supra* note 2, at 497.

69. CAUSATION at 431–64.

70. *Id.* at 464 ("common-sense causal limitations are introduced in a disguised form as part of the theory of fault").

71. Two examples are the exclusion of harm caused by a "process of a radically different sort from any that could be expected," *id.* at lxvii, and the extension of liability to include harm "within the risk" where there is only an "occasioning" relationship. Both of these rules do not follow easily from Hart and Honoré's approach. Why, for example, should the exact process by which a result comes about be foreseeable in order to count as a cause? These are, however, risk theory results in line with, for example, *Wagon Mound (No. 1)*, *Overseas Tankship v. Morts Dock & Eng'g Co.*, 1961 A.C. 388; see CAUSATION at lxvii, 176, 275–84, 287.

that the theory adopted after the "break down" is in use at any other time.

An empirical investigation of ideas of causation could begin with the construction of a number of different workable causal theories. Then, one would ask questions about when and why the same person appeared to use different theories and different people appeared to use the same theory. But Hart and Honoré do not attempt such an empirical investigation despite the occasional protestation that their business is not to manipulate but to understand causal notions.⁷² *Causation in the Law's* authors are advocates, not sociologists.⁷³

This takes us back to the original question: Even if Hart and Honoré were accurately to describe ordinary usage, why should we worry if our usage is non-standard?

Hart and Honoré's reply, judged by their own very high standards, is extremely weak.⁷⁴ Their only response appears to be that one should accept "ordinary usage" because judges from time to time claim to do so.⁷⁵ Even if their only intention were to understand judicial behavior, which it is not, why are they so ready here to take what judges say at face value, particularly when elsewhere in the book they are not?

This criticism does not establish that there are no reasons to adopt ordinary usage as a standard. It merely shows that Hart and Honoré provide none. One can only speculate that, as good positivists, they were worried that they may have committed themselves to an argument that threatened to shift from what is to what ought to be, a linguistic version of Stammer's natural law with variable content.⁷⁶ Such totems need not detain anyone else.

One possible argument for ordinary usage is the weakness of the alternatives. The only other theory on offer is that causal language, indeed all legal language, is "functional."⁷⁷ That is, words and concepts exist only to be manipulated for some end. But what end? Suggestions include the maximization of wealth,⁷⁸ the minimization of the costs of accidents and of

72. See *supra* note 57.

73. Compare Edgeworth, *supra* note 64. Advocacy by re-description is the most familiar of common law methods. It is more interesting when scholars adopt the same method. Recent examples include G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982), and R. DWORKIN, *LAW'S EMPIRE* (1986). These days "law as . . ." is more important than "law and . . .".

74. They do provide a reply to a different, interesting, question: Even assuming that one accepted their theory, why should one use it to establish legal liability? I consider that question below.

75. CAUSATION at xxxiv.

76. See C. ALLEN, *LAW IN THE MAKING* 24 (7th ed. 1964); see generally R. STAMMLER, *THE THEORY OF JUSTICE* (I. Husik trans. 1925).

77. See, e.g., Cole, *supra* note 2, at 471-73; De Wet, *supra* note 2, at 141-42. Green, *supra* note 2, at 566 n.71. But see Calabresi, *supra* note 13, at 70 ("This functional approach has come to dominate American tort scholarship.").

78. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986).

their avoidance,⁷⁹ corrective justice,⁸⁰ distributive justice (including the spreading of risk),⁸¹ and justice simpliciter,⁸² not to mention the furtherance of whatever other ad hoc policies lie behind particular enactments and constitutions. Hart and Honoré suggest that one cannot even resort to compensation of the victims of misfortune because compensation paid by a wrongdoer (the "ordinary" meaning of compensation, according to Hart and Honoré—but is it?) differs significantly from compensation paid by someone else.⁸³

Most likely, these various goals are incompatible. Even if we could agree on a coherent ranking of them, we would probably disagree on how to further them in any particular case. Hart and Honoré could well argue that the functional approach is liable to lead to chaos. One is much more likely to find agreement about central or core meanings of words than about policies or political programs.

There are two major objections to this claim that the functional approach should be rejected as demonstrably inferior. The first objection is that we cannot assume that we are in a position to *choose* between treating language as autonomous and treating it as "functional." Once one has thought of the latter possibility, it is very difficult to return to the former. One starts to see interests everywhere, even where there is only blissful ignorance. It is like being expelled from Paradise—and for similar reasons as in the original.

Many people are trying to recreate Paradise by raising an edifice of goals and purposes that they hope will achieve general assent.⁸⁴ In consequence, these people never tire of exposing subterfuges and fudged arguments and demanding that questions of policy and morality be clearly defined and explicitly discussed.⁸⁵ They do this because Paradise cannot truly be regained unless we agree on everything. Unfortunately, clarity is

79. G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

80. Epstein, *supra* note 2; Epstein, *Causation and Corrective Justice*, *supra* note 8; Epstein, *Nuisance Law*, *supra* note 8.

81. Calabresi, *supra* note 13, at 102-05.

82. ETHICS, *supra* note 19, at 179 n.2; G. CALABRESI, *supra* note 79, at 26-31; *see also* R. DWORKIN, *supra* note 73, at 242-44 (justice within bounds of "integrity").

83. CAUSATION at lxxiii.

84. Even Calabresi gives this impression, *see* Calabresi, *supra* note 13, at 70; G. CALABRESI, *supra* note 79. For his considered opinions, *see* generally G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* (1978), and now G. CALABRESI, *IDEALS, BELIEFS, ATTITUDES AND THE LAW* (1985). His view is that "our" shared scheme of values is incoherent and contradictory. It is, however, the best "we" can do. Calabresi is a conflict theorist only in the sense that he is concerned with internal conflicts which everyone in a society could suffer. He does not analyze these internal conflicts as conflicts of interest between specific groups, or emphasize the overall importance of such conflicts. In other words, his view is that a return to Paradise requires both consensus and *honesty*, but that it is impossible to achieve both simultaneously.

85. *See, e.g.*, R. KEETON, *supra* note 2, at 93-94; Cole, *supra* note 2, at 465; Green, *supra* note 2, at 562-76; Mansfield, *supra* note 2, at 488-89, 522 (criticizing Hart and Honoré for lack of clarity).

not always prudent;⁸⁶ it may serve only to sharpen conflicts, or even to make them unresolvable.

The other objection is that to agree to be governed by the dictates of whatever happens to be general usage is like agreeing to be governed by the toss of a coin. The analogy is not quite exact because, unlike pure chance, there would be at least a degree of formal rationality in decisions according to ordinary usage—that is, reasons of a sort would be given. Nevertheless, the analogy is useful insofar as such a system would not operate on the basis of substantive rationality.⁸⁷ Hart and Honoré might reply that “ordinary language” does not develop randomly, but reflects and expresses an underlying consensus about ethical and political standards;⁸⁸ indeed it expresses this consensus more accurately than, for example, professional political philosophy.⁸⁹

Hart and Honoré’s position is capable of a more subtle exposition. They are separating their instructions on the application of their method from the justification for using their method at all. They enjoin judges to treat “ordinary language” as an objective fact about other people, one fundamentally beyond the judges’ own personal preferences and beyond their ability to manipulate. In so doing, judges will, in fact, be following the ethical and political principles of ordinary people, although they will not understand themselves to be applying any such principles. Instead, they will see themselves as making factual judgments based on common sense. Thus Hart and Honoré manage to combine democracy with purely “legal” (non-political) judicial interpretation.

Nevertheless, this reply is open to important objections. To begin with, if there is no evidence of consensus on “ordinary” usage, then evidence of a shared way of life and shared values must be found elsewhere. But even if we were to find probative evidence as to lawyers’ opinions on issues other than usage, it is far from clear that this evidence would support Hart and Honoré. It is more likely that, although lawyers share some values and ways of life, there is more conflict and difference than consensus among them.⁹⁰

86. *But see* Calabresi, *supra* note 13, at 107–08.

87. *See* 2 M. WEBER, *ECONOMY AND SOCIETY* 656–57 (G. Roth & C. Wittich eds. 1968) (Weberian sense of substantive rationality).

88. For example, constitutions are supposed to express a long-term, developing consensus. *See, e.g.,* G. CALABRESI, *supra* note 73, at 51; Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1039–72 (1984). *But see* R. DWORKIN, *supra* note 73, at 355–99.

89. Oddly, this very point was used to criticize Hart and Honoré’s claim that ordinary language can sort out causation problems without recourse to policy. *See* Hancock, *supra* note 2, at 151–52 (usage of term is not necessarily policy-free, since usage may have come to reflect long-term value consensus).

90. *See generally* R. COLLINS, *CONFLICT SOCIOLOGY: TOWARD AN EXPLANATORY SCIENCE* (1975); R. DAHRENDORF, *CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY* (1959); E. RUBINGTON & M. WEINBERG, *THE STUDY OF SOCIAL PROBLEMS: FIVE PERSPECTIVES* 87–127 (3d ed.

In any case, the reply presupposes that consensus is necessarily a good thing. It may not be. First, it may reflect not shared values, but the distribution of power. In a society where inequality of power is so great that those at the bottom have no hope of improving their situation, and perhaps may not even be able to formulate independent views, one might find a "consensus" that is no more than a surly, demoralized acceptance of the status quo. Second, a large degree of consensus may be a bad idea.⁹¹ A moderate degree of conflict encourages innovation—excessive consensus may stifle it.⁹² More generally, excessive consensus promotes a totalitarian frame of mind—those who rarely encounter difference may not be able to tolerate it. Freedom entails the possibility of difference, and difference carries the risk of conflict.

IV. THE CONTEXT OF CAUSATION

A major deficiency in the first edition of *Causation in the Law* was the lack of an overall view of the relationship between causation and other elements of liability. According to several critics,⁹³ this resulted in an over-emphasis on causation and a tendency to lose sight of the complexity of the issues that Hart and Honoré lumped together as "legal policy." This deficiency is made good in the Preface to the second edition in the shape of a short essay entitled "Legal Responsibility and Legal Policy."⁹⁴

The essay is divided into four parts. The first is an elementary model of the grounds for responsibility in law; the second, based on an article by Honoré,⁹⁵ distinguishes two causal limitations on legal responsibility from three non-causal ones; the third discusses one way in which, they claim, causal issues come to be confused with non-causal issues; and finally, Hart and Honoré refer to the incidence of the burden of proof. I shall consider each in turn.

1981).

91. See, e.g., N. MACHIAVELLI, DISCOURSES ON THE FIRST TEN BOOKS OF TITUS LIVY 111–15 (B. Crick ed. 1970) (Books 1.4, 1.6).

92. See, e.g., K. MARX, *The British Rule in India*, in 2 MARX: SURVEYS FROM EXILE 305–07 (D. Fernbach ed. 1973); Coser, *Social Conflict and the Theory of Social Change*, 8 BRIT. J. SOC. 197 (1957). See generally L. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* (1956) (social conflict can contribute to group cohesion).

This is, of course, far from all there is to say about innovation, technical or social. See generally J. ELSTER, *EXPLAINING TECHNICAL CHANGE* (1983). Indeed, Marx can be read as believing that under socialism, when there will be no social conflict, technical innovation will occur at an unheard of rate. This does not, however, seem plausible.

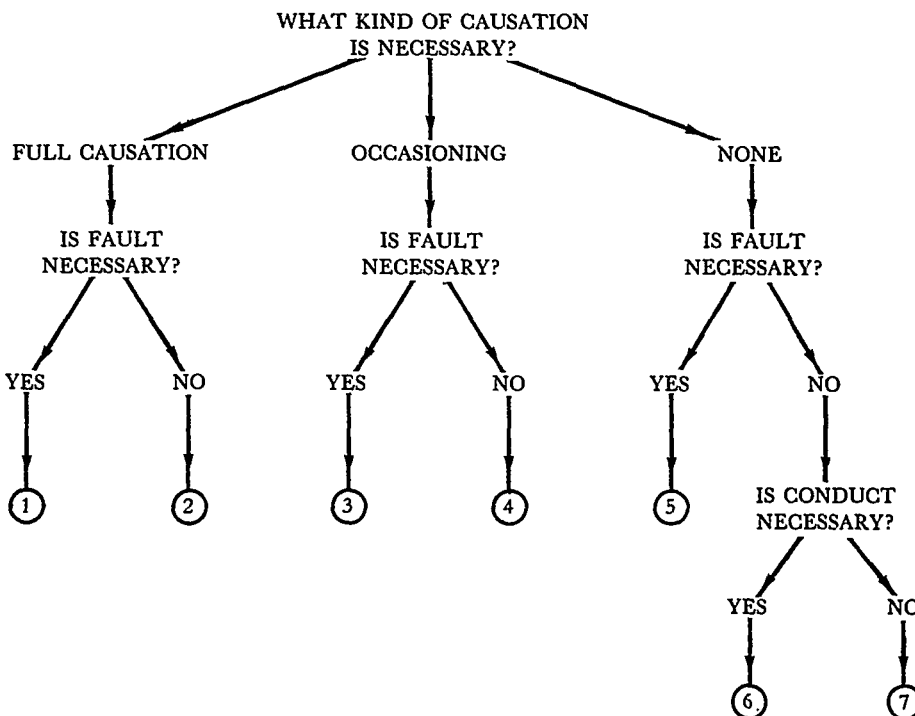
93. See CAUSATION at xlii–xliii (discussing critics).

94. *Id.* at xlii–xlv.

95. Honoré, *Causation and Remoteness of Damage*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: TORTS (1983).

A. *Grounds of Liability*

The Hart and Honoré grounds of liability model reduces all problems of legal liability to three questions. The first question is what kind of causation is required for liability. Hart and Honoré allow three possible answers: (1) Full causation, which is "cause" in the sense advocated by *Causation in the Law*. "Cause" in this sense is not just a background condition, but a cause unencumbered by voluntary or coincidental intervening causes; (2) "Occasioning," meaning being a "but-for" cause—that is, a "condition;"⁹⁶ (3) No causation requirement at all. The second question is whether *fault* is necessary for liability—in the broadest sense of fault, one which includes both intentional and negligent wrongdoing. The third question is whether any "conduct" at all on the part of the defendant is necessary. Hart and Honoré combine these questions to produce seven species of liability, which might be represented as follows:

Fig. 1. *Hart and Honoré's Grounds of Liability Model.*

96. This sort of cause could perhaps more accurately be characterized as being a necessary member of a sufficient set.

Causation and the Law

Species 1 is the position of classical negligence and many other torts and crimes. A finding of liability requires both full causation, not just “occasioning,” and fault of some sort. Species 2 is where there is strict liability but full causation; *Rylands v. Fletcher*⁹⁷ is an example. Species 3 is where fault is necessary for liability but full causation is not, “occasioning” being sufficient. This would describe liability for negligently providing another with an opportunity to harm the plaintiff, for example, where P is injured by a car negligently driven by T, after T had stolen it from D, who had negligently left the doors open and keys inside. D’s fault did not “cause” P’s injury in the full sense, because T’s act is voluntary and intervening. But it did “occasion” the injury. Species 4 is where only “occasioning” is required but not fault. This would describe the liability of a seller of goods for non-delivery, who has no excuse even if the non-delivery is caused by the act of an independent third party. Species 5 is where a defendant is condemned for being at fault without any proof of causation. Examples would be crimes of dishonesty, possessing stolen goods, or attempting a crime.

If neither a finding of fault nor a finding of causation is required for liability, Hart and Honoré go on to ask the third question: Is *any* conduct on the part of the defendant necessary for liability?⁹⁸ What exactly they mean by “conduct” is unclear, but it appears that the lack of a conduct requirement (Species 7) moves into the realm of the liability of insurers and guarantors (whose liability presumably arises from their obligations, not their own movements). Where a finding of “conduct” is necessary, although in the absence of fault and causation, the matter is characteristically one of strict liability crimes or regulatory offenses. Certain automobile offenses in Britain, for example driving without rear lights, would be in this category. While it is no defense that one did not know of the problem, nor that it caused no harm, it is necessary that one have been driving.

If the only point of Hart and Honoré’s model was to show that “legislators and, in default of clear guidance from them, . . . judges”⁹⁹ have a wide range of theories of liability to choose from, not all of them containing the requirement of causation, then it would have achieved its purpose. The choice of which ground is relevant in a particular type of case is indeed always a matter of “policy.” But if the point is also to locate causation in legal liability as a whole, then the model has to be accurate, and it is not.

97. [1866] 1 L.R.-Ex. 265 (Exchequer Chamber); [1868] 3 L.R.-H.L. 339 (House of Lords).

98. The question is irrelevant if either a finding of fault or some kind of causation is required. To be at fault, or to cause or occasion something, seems to entail conduct of some sort, even if only of omission.

99. CAUSATION at xlvii.

To begin with, the "conduct" question¹⁰⁰ leaves much to be desired. It is relevant only with respect to one combination of tests—the liability of insurers and guarantors—and even then it does not work. Presumably, the relevant conduct is agreeing to insure or guarantee. Much worse, the "causation" element is conflated with an element that does not figure explicitly in the model but should, namely "harm." Surely one has to ask whether anything needs to be "caused" before asking either *how* it has to be "caused" or what should count as "causing." Hart and Honoré's model is confusing because two of their answers to the question "what kind of cause?" (namely, full causation and occasioning) presuppose that something is caused, whereas the third answer (no causation requirement) presupposes no such thing. This explains why they introduce their "conduct" question, unsatisfactory though it is. The result is that their model has no place for liability where it is necessary to find that the plaintiff was harmed, but not necessary to find that the defendant caused or occasioned the harm. *Sindell v. Abbott Laboratories*¹⁰¹ would fall into this category. There, liability was imposed on wrongdoing defendants, even though it was impossible to show that a particular defendant caused or even occasioned the harm to a particular plaintiff. Admittedly, it might sometimes be possible to deal with such cases by saying that the plaintiff is suing not for the harm itself but for the increased risk of harm occasioned or caused by the defendant.¹⁰² But this approach will be unsatisfactory where a defendant is held responsible for the whole damage, not just for the proportion of the damage equivalent to the increased risk. One such case is *Summers v. Tice*,¹⁰³ where both D₁ and D₂ were held liable for the whole loss suffered by P when they had both fired shotguns in P's general direction, but only one pellet—unidentifiable beyond the fact that it came from either D₁'s or D₂'s gun—had injured him.

If one reconstructs the model, accepting Hart and Honoré's conceptual analysis, but also taking into account the above criticism of its structure, one obtains a more accurate framework. In the new model there are still three questions, but the "conduct" question is replaced by a "harm" question: Is it necessary for some victim or plaintiff to have suffered harm before liability is found? The new model has four new species of liability, in addition to Species 1-4 of Hart and Honoré's model.¹⁰⁴

100. See *supra* text accompanying note 98.

101. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

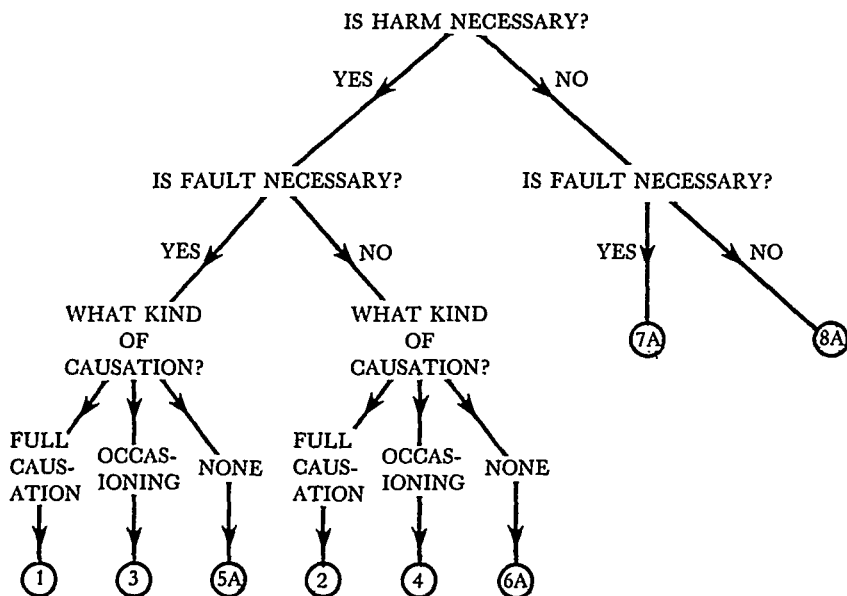
102. See *infra* text accompanying note 125.

103. 33 Cal. 2d 80, 199 P.2d 1 (1948).

104. Hart and Honoré's Species 2 through 4 are substantially similar to Species 2 through 4 in the modified model.

Causation and the Law

Fig. 2. A Modified Grounds of Liability Model.



The four new species in the modified model are numbers 5A, 6A, 7A, and 8A. Species 5A accounts for the *Sindell* and *Summers* examples already discussed. Species 6A is a no-fault version of Species 5A, and is the proper home of the liability of insurers and guarantors. In these cases there is no liability without damage to someone (the insured or the creditor), but the defendant need not have been at fault nor in any way have caused the damage. In Species 7A and 8A, it is unnecessary to discuss causation at all, since the question of causation is irrelevant where there is no need to show damage. Species 7A, where liability is founded on fault alone, without the necessity of showing harm, most obviously covers "victimless crimes" (illegal consensual sexual acts, for example) but also, perhaps more importantly, criminal attempts and conspiracies. Number 8A, where neither harm nor fault need be shown, is broad. It includes infamous "status crimes" (being a relative of an enemy of the state, for example), as well as some minor regulatory offenses where liability is strict (e.g., selling adulterated food even where the goods cannot be inspected by the seller). It would also include the anomalous tort of trespass to land and, by extension, actions to vindicate property rights.

Working through the consequences and details of the modified model is beyond the scope of a book review. It may be, for example, that Hart and Honoré's category of "neither full causation nor occasioning" ("none" in the diagrams) needs to be broken down further. Species 6A of the modi-

fied model (no fault and no causation) includes both insurance liability and a *Sindell* situation in a jurisdiction with strict liability for products. But these are clearly different sorts of liability. In the insurance case there need not even be the possibility that the defendant caused the harm. In the products case, however, it has to be *possible*, even though it cannot be shown, that the defendant's activity caused the harm. If a *Sindell* defendant could show that its actions could not possibly have caused the harm, the defendant would win—but such a defense would be ludicrous in an insurance case.¹⁰⁵

Nevertheless, the modified model as it stands does serve to illustrate that even in their second edition Hart and Honoré have not fully worked out the connections between causation issues and other issues. Most importantly, as the diagrams illustrate, Hart and Honoré make causation the first and thus central question in their model of the grounds of liability. This produces confusion. Even if causation is one of the important questions, it is not relevant all of the time, whereas other questions, such as fault, are.

B. *Limits of Legal Responsibility*

A similar problem arises in the second section of the mini-essay, "The limits of legal responsibility."¹⁰⁶ Hart and Honoré identify five types of limitations that may be imposed on legal rules: necessity, later intervention, probability, the scope of the rule, and equity. The first two they characterize as "causal," questions of fact suitable for decision by a jury. The last three they characterize as "non-causal," presumably questions of law and policy best suited for decision by the judge. Furthermore, the question of whether each limitation is applicable at all to the case at hand is also a question of law for the judge.

"Necessity" is simply their modified Millian version of *causa sine qua non*, that is, the requirement that the defendant at least "occasioned" the harm. "Later intervention" means intervening voluntary actions and "co-incidences" which, they allege, would rob the antecedent condition of title to the epithet "cause." "Probability" includes foreseeability (about which the authors are "less enthusiastic"¹⁰⁷ as a limitation, though they would admit it as an *extension* of liability). It also includes such questions as whether the apparent risk of harm was sufficiently great given the defend-

105. Cf. CAUSATION at liii–liv. The same point applies to Species 5A in the modified model. What "possible" means here remains to be resolved. An approach combining the question "do you think that it was at all likely that X caused Y" might be possible, combining a subjective probability with the principle *de minimis non curat lex*.

106. CAUSATION at xlvii–li.

107. *Id.* at li.

ant's conduct, or was significantly increased by it, and whether, as per the German formula, the conduct was "adequate" for the harm.¹⁰⁸ "Equity" appears to be the application of such overarching principles as the "moral injustice" of allowing people to benefit from their own wrongdoing.¹⁰⁹ A "scope" limitation is based on the argument that a rule should not apply outside the area of activity it is designed to regulate. Scope limitations are most appropriate to breaches of statutory duty (a separate theory of liability in England, not just part of negligence), as for example in the famous case of *Gorris v. Scott*.¹¹⁰

Most of the controversy between Hart and Honoré and their various critics can be derived from this schema. In particular, labelling "later intervention" issues as causal and factual and "probability" issues as non-causal neatly sums up the conclusions of *Causation in the Law* that most frequently elicit dissent.

If, as Hart and Honoré say, "later intervention" issues can be characterized as causal and factual, then one can draw conclusions about the significance of intervening actions of third parties without reference to issues apart from causation, and without recourse to ethical or policy arguments. However, they also say that an intervening event cannot limit lia-

108. See CAUSATION 465-97 ("adequate cause," or more recently just "adequacy," is a form of substantially-increasing-the-risk theory).

109. *Id.* at 1, 217 n.58.

110. [1874] 9 L.R.-Ex. 125. A statute required pens of not more than a certain dimension to be installed on ships that carried domestic animals. The defendant failed to provide such pens. The plaintiff's sheep were washed overboard, for which the defendant was not held liable. The conventional exegesis of this case, followed by Hart and Honoré, is that since the purpose of the statute was to prevent disease and not drowning, the harm suffered must have fallen outside its scope. Because Keeton's risk theory requires causation and scope to amount to the same thing, he also argues that the violation of the statute cannot be the cause, since the defendant could have breached the statute while preventing the drowning, for example by providing pens that were too big for the law, but big enough to save the sheep. Keeton, *supra* note 2, at 16. This argument depends on a strict version of the "negligent aspect" theory whereby the causal tests are applied not to the defendant's conduct as a whole, but only to the "negligent" part of it (In the *Gorris* case, using the wrong sized pens and no other possibly wrongful aspect of the defendant's behavior). Some writers reject the "negligent aspect" approach *in toto*. See, e.g., Green, *supra* note 2, at 562-74. Hart and Honoré claim to have a "moderate" position that "courts generally require the wrongful features of the defendant's conduct to be shown to be causally relevant, but sometimes, for special reasons, impose a more stringent liability by treating the causality of other, lawful features . . . as sufficient." CAUSATION at lxi. They reject, therefore, Keeton's more specific theory, but talk about whether "lawful conduct" would have avoided the harm. They fail to see that this standard is troublesome when applied to common law negligence. See *infra* text accompanying notes 141-46. Moreover, they fail to appreciate that, as in the license cases, there are always two ways of acting lawfully: Carry on as before, but obey the statute (get a license), or refrain completely from the activity in question. (This is related to the "elimination" versus "substitution" debate referred to *supra* note 26.) The question becomes one of statutory policy. Licenses are required for a variety of reasons: to raise revenue, to impose training, to discourage the activity without banning it. In *Gorris*, one possible policy was to keep as many diseased sheep as possible out of Britain; that is, it was a public health statute. From this point of view, the fact that the plaintiff's sheep were at the bottom of the Channel was at most neutral, and perhaps a good thing (especially since they were unpened). The result of the accident in this regard approximated that which should have happened had the statute been obeyed—keeping diseased sheep from reaching Britain.

bility unless it alone would count as a "cause" under the "makes a difference to normal functioning" test.¹¹¹ This last point is subject to challenge: If one cannot establish that an event is a "cause" in the "makes a difference" sense without importing moral or at least practical criteria, the claim that we are dealing here with purely "factual" issues cannot be sustained.¹¹²

Attempts to define methods of establishing "makes a difference" causation in terms of purely factual issues tend to turn on definitions of normality or voluntariness. "Normality" arguments begin with the observation, shared by Hart and Honoré, that deciding whether an event is the "cause" or just "part of the background" varies with the context and one's interest in the problem.¹¹³ Some writers have gone on from this to say that the question is purely practical: Which of the conditions might one be able to influence next time?¹¹⁴ Hart and Honoré reply that frequently we locate causes where we could have no influence at all (the weather, for example), and the authors imply that the practical interests involved in legal judgment are of little consequence because the issues and the interest of the investigator are rarely controversial. One might reply in turn that the investigator has a clear interest in assigning blame. But the authors could answer that the proposition that in some circumstances causation is a necessary condition of legal responsibility does not give any grounds to believe that responsibility is a necessary condition of causation. Further, one might argue that the notion of "normal" or "natural" functioning is inherently normative. Hart and Honoré could reply that a sequence of events can be "normal" even though one disapproves of it¹¹⁵ (the "normal working method" used by a particular murderer, for example). This definition may be technically correct, but it is not "ordinary usage." The phrase "usual course of events" approaches what Hart and Honoré intend, but except for contractual problems¹¹⁶ they appear to avoid using it. Perhaps this is because the phrase has the connotation of frequency and probability and thus, in their view, not causation. I will deal with this inhibition below.¹¹⁷

Another way of attacking the classification of intervening events as "factual" is to look more closely at the criteria that Hart and Honoré use

111. See *supra* text accompanying note 42.

112. Of course, this situation would not entail the removal of the issue from the jury—as Hart and Honoré seem to think it would.

113. See *supra* text accompanying notes 41–43.

114. See, e.g., R. COLLINGWOOD, *AN ESSAY ON METAPHYSICS* 300 (1940).

115. Hart and Honoré do not actually argue this way because they are more concerned with the issue of causing someone *harm*, not causing them to *benefit*.

116. CAUSATION at 315–17.

117. See *infra* text accompanying notes 122–31.

to decide whether such events are “voluntary.” The point is not that the whole enterprise requires us to make claims about the thoughts and states of mind of other people. There is no need to restrict our notion of “factual” to the way in which we might investigate physical phenomena. The point is that judgments about what is sufficient knowledge for making an informed choice, and judgments about whether one has “no real choice” because one must elect one of two “evils,” cannot be resolved by factual information about the defendant or the situation alone. Consider the following cases, where D injures P in a road accident. In the first case P refuses to have a blood transfusion for religious reasons. With the transfusion she would have survived, but instead she dies. In the second case a country doctor ignorant of the latest medical techniques treats P, but fails to save her. In the first case, from P’s point of view, her intervening act is not fully voluntary because it is a choice between two evils. Whether a court should so treat it, however, involves issues of religious tolerance and judgments of what behavior counts as reasonable. In the second case, does the doctor have sufficient knowledge to make his action count as “voluntary”? To answer this question, someone has to make a judgment about what country doctors *ought* to know. Again, these judgments of practical morality may be well within the capacity of a jury, but purely “factual” they are not.

Hart and Honoré openly admit that moral criteria are important when the issue is whether to impose liability because R provided S with an opportunity to harm T, or X robbed Y of the opportunity to avoid harm. Would S have harmed T anyway? Would Y have taken the opportunity? Notions of what a reasonable person would have done cannot be excluded here. However, Hart and Honoré neatly evade this problem by saying that these cases exemplify a new type of liability for “occasioning harm.”¹¹⁸ This exploration concedes the point that judgment in these cases is not purely factual because, as they admit, whether a particular test applies is a question of legal policy.

Equally controversial is Hart and Honoré’s classification of the “probability” limitation as non-causal (and non-factual, or at least a non-jury issue). The contention that these judgments are not factual is surely untenable. Although on the best view probability is for legal purposes a subjective matter (what odds would I take that X will happen, or even that X is the case),¹¹⁹ the same is true for all “factual” judg-

118. CAUSATION at xlv, 194–204.

119. For this “Bayesian” or subjective approach, see, e.g., Giles, *A Logic of Subjective Belief*, in 1 FOUNDATIONS OF PROBABILITY THEORY, STATISTICAL INFERENCE, AND STATISTICAL THEORIES OF SCIENCE 41–72 (1976); Schefe, *On Foundations of Reasoning with Uncertain Facts and Vague Concepts*, in E. MAMDANI & B. GAINES, FUZZY REASONING AND ITS APPLICATIONS 189–216 (1981) (outlining method of reasoning from subjective uncertainty); see also Gaines, *Foundations of*

ments—indeed, perhaps all judgments. We are seldom absolutely certain about anything of importance; we believe with varying degrees of confidence, sometimes adjusting our beliefs—but more frequently our level of confidence—in light of new evidence. “Foreseeability” involves a little more speculation (What would I have said the chances were at the time in question?) but is in principle no different.

There are better grounds for saying that “probability” is non-causal. As many writers, including Hart and Honoré,¹²⁰ have stressed, a belief, or even certain knowledge, that X is followed by Y Q% of the time differs from a belief that X causes Y, even if Q is greater than 50%. The difference is that if one only believes in the probability, a single case in which X was not followed by Y makes no difference to one’s belief (unless one believes that Q equals 100%). On the other hand, one who believes in the causal relation would need an explanation: How is this case different from the norm so that Y has not in this instance occurred? If one could not find an explanation, one might consider abandoning one’s belief.¹²¹

One must, however, be clear about the effects that this argument has on probabilistic statements used in law. Statements that “under conditions C, the probability of X is Q” may be causal in the sense that C is thought to cause a probability field,¹²² such that the likelihood or proportion of X outcomes is Q (and no other number). Experiment or experience may show that the proportion of X outcomes is not Q but P. In such circumstances one would feel an obligation either to explain away the new pattern or abandon the hypothesis. Furthermore, statements of probability as expressions of subjective confidence are also not excluded from being causal. One can still say that one believes with 60% certainty that X caused Y. If it turned out that in the particular case X did not cause Y, one might well worry about one’s theory, but one’s first reaction should be to apologize for being wrong.

In consequence we should be very careful how we assess the causal content of phrases like “materially increased the risk of injury,” which sometimes appear in the case law.¹²³ One possible use of such a statement

Fuzzy Reasoning, 8 INT’L J. MAN-MACHINE STUD. 623 (1976).

Judges and jurors do not, of course, literally “bet” money that their opinions are true; they bet peace of mind and conscience. Even if there is no way that the truth will ever be known, nor that one will be identified as having made the mistake, a virtuous person will still take this “bet” (or “venture”) seriously. “Rational maximizers” of temporal wealth may not, in fact, act in this way, but that is their problem.

120. CAUSATION at 48–49.

121. That one does not abandon one’s belief in such circumstances is usually a matter of faith that a convincing explanation does exist, and will turn up, even though one has not yet formulated it.

122. See, e.g., Popper, *Quantum Mechanics Without the Observer*, in M. BUNGE, *QUANTUM THEORY AND REALITY* (1967); cf. R. SHELDRAKE, *A NEW SCIENCE OF LIFE* 82–85, 96–101, 112, 118 (rev. ed. 1985). See generally K. POPPER & J. ECCLES, *THE SELF AND ITS BRAIN* (1977).

123. See, e.g., *McGhee v. National Coal Bd.*, [1973] 1 W.L.R. 1, 5 (equating materially increas-

is in a situation where one is reasonably confident that B causes disease D, and also that C causes disease D. The evidence in the case at hand, D having occurred, is consistent with both B and C. Experts claim that of all the instances of D, B is clearly the cause on more occasions than C. Would one be justified in deciding that in this case B caused D? The answer is that the validity of this conclusion depends, among other things, on the absolute difference between the proportion of cases attributable to the two causes, on the number of instances on which the conclusion is based, and above all on the degree of uncertainty one is prepared to accept. In the end, a subjective (or perhaps in most instances a community) standard of tolerance for doubt will be decisive.

Another possible use of “materially increasing the risk” depends on definite probability fields. Consider the following example: The best evidence is that if X is present the probability of D is 70%, whereas if X is absent the probability is only 60%. The defendant causes X to be present and the plaintiff suffers from D. In these circumstances, we have no causal beliefs about D itself, but only about the probability of D under different conditions. Thus we cannot say that the defendant caused the harm itself, only that the defendant caused the harm to be more likely. In this sort of case it is appropriate to try to value the “lost chances” according to the difference between the risk levels with and without the defendant’s conduct. Note that it makes no difference whether the risks in question are both below 50%, both above 50%, or one below and one above. We are concerned with the difference, not the absolute level of risk, for *ex hypothesi* we have no beliefs about the causes of harm themselves.¹²⁴

When Hart and Honoré resort to the “increased risk”¹²⁵ idea, they do not make these distinctions and appear in danger of contradicting themselves as a result. The philosopher Mackie challenged Hart and Honoré’s analysis of the “speeding” cases, in which breaking the speed limit brings someone to a point on the road where something bad happens, such as a tree falling on the car as a result of someone’s fault.¹²⁶ The details of the argument¹²⁷ need not detain us here. All that matters is that the second edition of *Causation in the Law* adopts the now orthodox view that the

ing risk of injury with materially contributing to injury).

124. The argument in the text might have helped Sir John Donaldson, M.R. in *Hotson v. East Berkshire Health Auth.*, [1987] 2 W.L.R. 287 (C.A.), *leave to appeal to House of Lords granted*, [1987] 1 W.L.R. 224, where he allowed a claim for a loss of a chance (of better medical care) but proclaimed, *id.* at 297, “[*McGhee* is] an authority which I have difficulty in understanding.”

125. See CAUSATION at xxxix, 168–78; see also *id.* at 122, 323–24, 410, 469–70, 473–74, 478, 485–88.

126. See J. MACKIE, *supra* note 2, at 130–31; see also CAUSATION at xxxviii–xxxix (discussing Mackie). The classic case, a matter of contributory negligence in a suit against the tree owner, is *Berry v. Sugar Notch Borough*, 191 Pa. 345, 43 A. 240 (1899).

127. CAUSATION at xxxviii–xxxix.

driver's speeding is not to be counted as a cause of the loss because speeding does not, as far as we know, increase the likelihood that trees will fall.¹²⁸ This statement is unexceptionable if understood as saying that hearing about this case has not altered our confidence that speeding does not cause trees to fall; or as saying that speeding does not cause the probability of trees falling to change, so that the lost chance involved has a value of zero. By not explaining their usage of "increased risk," however, Hart and Honoré needlessly appear to contradict their own stated position that, to count as a "coincidence," two events must, among other things, be *causally* (not probabilistically) independent¹²⁹ of one another.

There is also a more radical account of multiple cause problems, not considered by Hart and Honoré, to the effect that the *only* possible causal statements are those about probability fields.¹³⁰ If true of physical events—I am not qualified to judge issues of physics—this assertion will also be true of social events. Indeed, even this position may be too optimistic a view of generalizations about human affairs. Either because of free will or because human conduct is so complex,¹³¹ human beings must treat human conduct as radically indeterminate. Hart and Honoré (and Mackie all the more) might reply that this indeterminacy does not matter because regularities in human conduct are not needed to sustain causal statements about the conduct.¹³² But because such generalizations must play a large part in the counterfactual arguments that each of these writers maintains are necessary for causal statements,¹³³ I doubt whether one can sustain a causal argument without them. Even if one could, Hart and Honoré should still be worried by situations of radical indeterminacy. If these exist, we can never say that a condition, or set of conditions, was or was not necessary or sufficient for a particular outcome. If events sometimes just happen without obeying any detectable regularity,¹³⁴ it is impossible to talk about any event being necessary for any other, or even necessary to make a set of events sufficient for an outcome.¹³⁵ If events sometimes just

128. That is, barring "vibrations." See Calabresi, *supra* note 13, at 72.

129. CAUSATION at 78–79, 176–78.

130. For further discussion, see J. MACKIE, *supra* note 2, at 9. For a more radical view that the physical "laws" of the universe are not only probabilistic, but also are not constant, being instead built up historically by repetition of similar events over time, see R. SHELDRAKE, *supra* note 122. Such views are not incompatible with a purposive universe. See *id.* at 199–208; D. BARTHOLOMEW, GOD OF CHANCE (1984); see also K. WARD, THE TURN OF THE TIDE 33–36 (1986) (discussing *God of Chance*).

131. See A. MACINTYRE, AFTER VIRTUE 95–97 (2d ed. 1984). See generally *id.* ch. 8 (lack of predictive power of generalizations).

132. CAUSATION at 55; J. MACKIE, *supra* note 2, at 120–21.

133. But see J. MACKIE, *supra* note 2, at 57–58, 77–80.

134. This phenomenon we might label as, but not explain by, craziness or *actes gratuits*.

135. Cf. J. MACKIE, *supra* note 2, at 40–43 (Mackie's "chocolate machine" argument), discussed in CAUSATION at xl–xli.

do not happen, despite having occurred invariably under such conditions in the past, no event, or set of events, can be considered sufficient for any other—except in the tautological sense that the whole state of the universe must have been sufficient for the event.¹³⁶

C. *The Place of Policy in Causal Issues*

The third section of the mini-essay is a counter-blast to those critics who complained that Hart and Honoré failed to appreciate the blending of causal and policy issues, especially in negligence¹³⁷—for example, on the issue of “proximate cause.” The Hart and Honoré reply is essentially that such blending is the result of unnecessary and damaging confusion on the part of judges and commentators in the way they have formulated the issues, and that there is no benefit in reproducing error. But if Hart and Honoré dislike duty, negligence and proximate cause¹³⁸ or duty of care, breach of duty and harm not too remote¹³⁹ or duty, harm and risk¹⁴⁰ as formulae, what do they propose we tell the children? I fear their proposal is the ponderous model of the first two sections of the mini-essay—the grounds of liability and the five limitations.

Hart and Honoré also fail to take seriously enough the interdependence of many concepts used in the law of negligence. Consider, for example, the close relation between “cause-in-fact” and “negligence,” or what English lawyers would call “causation” and “breach of duty.” This deficiency in the discussion is all the more surprising since an analysis based on a full-blooded recognition of the interdependence of key legal concepts can be employed to support one of Hart and Honoré’s central points.

The problem is that if one accepts Learned Hand’s famous test as the best formulation of the negligence-breach-fault issues,¹⁴¹ as most American lawyers and Hart and Honoré do, one finds it riddled with causal presuppositions and questions. The most obvious problem is the “likelihood that . . . conduct will injure others” element, for which one must be able to imagine a great number of causal sequences ending in some kind

136. See J. MACKIE, *supra* note 2, at 40–43.

137. CAUSATION at lii–liii.

138. See CAUSATION at li.

139. See *id.*

140. See *id.* at lii.

141. Hart and Honoré take the conventional line and cite *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). Those of a less scientific disposition may prefer the version in *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940):

The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk. All these are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically.

of damage. But much more important is the causal nature of "interest[s to be] sacrifice[d] to avoid the risk."¹⁴² If a person could have prevented the harm at all, then that person's conduct (or lack of conduct) must *ex hypothesi* have "occasioned" the harm. Plainly it does not follow that the negligence issue is the same as the cause-in-fact issue, since frequently a cause-in-fact will not be "negligent." The defendant could have prevented the harm, but at such great cost for so little prospective benefit that a reasonable person would not have bothered.¹⁴³ But nevertheless the fact remains that a finding of negligence entails a finding of but-for cause. The Hart and Honoré contention supported by this argument is that the causal minimalist conception of causation—that is, but-for cause alone—is too trite to qualify as "the causation issue"; if there is to be such an "issue," it must be something else. Indeed, the argument demonstrates that the minimalist position fails to dispense with causal issues, but instead merely conceals them in other questions. Minimalists might welcome the implication that the causation issue cannot be separated from the value-laden issue of negligence, but the entanglement works both ways. If negligence presupposes causation, the former cannot be, as the minimalists have suggested, vastly more important than the latter.

On the other hand, one need not agree with Hart and Honoré's belief that there is a "real" causation issue somewhere beyond the issue of fault. Instead, one might ask what conception of causation will sustain a particular notion of fault. This inquiry turns Epstein upside down. Rather than asking "what can fault be if causation is central?" one asks "what can causation be if fault is central?" A line of investigation arising from this approach would consider whether strict liability and fault necessarily presuppose different conceptions of causation. Fault, for example, suggests a manipulative test under which cause is the same as ability to affect a situation or to prevent something.¹⁴⁴ This test, however, is not necessarily appropriate for legal rules justified by "deep pocket" considerations, such as strict liability for product-related harms without a state-of-the-art defense.

A corollary of the argument that Learned Hand's form of negligence

142. *Conway*, 111 F.2d at 612.

143. Incidentally, this line of reasoning provides another justification for holding a defendant not liable when a coincidence "overtakes" the result of the defendant's conduct—for example, where X carelessly sets fire to Y's house under circumstances where the fire would normally burn down the house, but the house is instead destroyed by a disastrous flood. What would X have had to do to prevent damage other than the minor damage done to the doomed house before the flood? See CAUSATION at 179–81, 245–49; Wright, *supra* note 2, at 1794–803.

144. Cf. CAUSATION at 35–36, 300 (cause identifies points at which public pressure or policy may affect results); R. COLLINGWOOD, AN ESSAY IN METAPHYSICS (1940); see also Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950) (similar idea that "cause" identifies pressure points—places where action could be taken effectively); Calabresi, *supra* note 13 (same).

presupposes causation is that in simultaneous cause problems (the three house fire problem, for instance), the court must be holding the defendants to a higher standard of care than normal. To have prevented the damage from the conflagration, each defendant would have had to anticipate and prevent the other's fire, or at least have taken steps to prevent its spread.¹⁴⁵ The only way to avoid this conclusion is to see the outcomes as imposing liability without fault in simultaneous cause cases, or at most, imposing a sort of hypothetical negligence in which the relevant cost of avoidance is *ordinary* avoidance cost, not actual cost.

Again, the point does not apply to strict liability torts, nor to breach of statutory duty, at least in England and in negligence per se states. If one can be held liable even though it was impossible for one to have prevented the damage, cause-in-fact becomes a separate issue again.¹⁴⁶ This in part explains the difference between the license cases and common law negligence.¹⁴⁷ For in the former, unlike the latter, there can be a finding of fault that does not entail cause-in-fact. Not having a license is wrong whether or not it causes damage. Driving without keeping a proper lookout may or may not be wrong depending on the consequences.

D. Burden of Proof

There is little to say about the fourth section of the mini-essay. It makes some sensible, but unexceptional, comments about how the burden of proof can be manipulated, as in simultaneous cause cases, such as *Summers v. Tice*,¹⁴⁸ and res ipsa cases, such as *Ybarra v. Spangard*,¹⁴⁹ to produce strict liability where previously there was fault. It is perhaps worth mentioning, however, that after a good deal of adverse comment,¹⁵⁰ and in order to take into account important cases, such as *Sindell*¹⁵¹ and *McGhee v. National Coal Board*,¹⁵² the chapter in the book that deals with evidence and procedure is greatly expanded.¹⁵³ In response to the

145. This is a higher standard because it is generally harder to anticipate and control someone else's behavior than to anticipate and control one's own.

146. Strictly, I suppose, the only harms that a person could not have prevented are ones that occurred before that person was born—barring reincarnation—but since the information costs of omniscience, not to mention the transactions costs of omnipotence, are, to say the least, prohibitive, I think we can ignore this as a quibble.

147. See *supra* note 110. Hart and Honoré incorrectly treat common law negligence and breach of statutory duty cases as equivalent. See CAUSATION at lxiii.

148. 33 Cal. 2d 80, 199 P.2d 1 (1948).

149. 25 Cal. 2d 486, 154 P.2d 687 (1944).

150. See, e.g., Green, *supra* note 2, at 554 (Hart and Honoré “do not keep in mind the necessities of procedural apparatus”); Nokes, *supra* note 2, at 354 (“treatment of Evidence and Procedure is less illuminating”).

151. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

152. [1973] 1 W.L.R. 1.

153. Compare CAUSATION at 406–30 with CAUSATION (1st ed.) at 364–80.

specific criticism that the book was not very useful for (American) practitioners because it failed to deal with judge-versus-jury issues,¹⁵⁴ there is a new section on that topic.¹⁵⁵ The additions, however, are not very enlightening, at least for this non-practitioner. They do recommend a jury instruction along the lines of "did the defendant cause the harm or did somebody or something else cause it," which perhaps shows overconfidence in their own analysis. They also maintain remarkably conventional views about the proper roles of judge (law) and jury (fact). The possibility does not seem to occur to them that this division might be politically controversial, as an attempt to limit lay participation in the administration of justice. One cannot help but feel that half a century almost completely devoid of the civil jury has left many English lawyers with an unduly technocratic vision of law, and that calls for judges to adopt "ordinary usage" are the remnants of a bygone way of deciding cases by jury.¹⁵⁶ Such calls attempt to invoke the democratic legitimacy of "ordinariness" without the inconvenience of allowing genuinely "ordinary" people to interfere with the work of the professionals.

V. CONCLUSION—WHY CAUSATION?

Of the great number of questions I have left undiscussed, an exceptionally important one remains, one with which I began. Even accepting Hart and Honoré's version of causation, why should the law take note of it? There are several answers to this question. The best known is one already mentioned—Epstein's claim that causation is not merely an essential element, but nearly the whole, of corrective justice.¹⁵⁷ Another is Calabresi's perhaps idiosyncratic suggestion that, whereas notions of increasing the risk of harm are essential for a successful regulatory scheme, the only justification for but-for cause is that it allows the courts to build up a substitute for actuarial tables.¹⁵⁸ David Fraser and I implied rather cynically that causal arguments allow courts to reach what they believe to be the right results without having to go into potentially embarrassing questions about duties and valuation.¹⁵⁹

Hart and Honoré give sketches of two replies.¹⁶⁰ The first amounts to

154. See, e.g., Green, *supra* note 2, at 554 n.25; Thode, *The Indefensible Use of the Hypothetical Case To Determine Cause in Fact*, 46 TEX. L. REV. 423, 429 n.24 (1968).

155. CAUSATION at 428-30.

156. See generally Murphy & Rawlings, *After the Ancien Regime: The Writing of Judgments in the House of Lords 1979/1980* (pts. 1 & 2), 44 MOD. L. REV. 617 (1981), 45 MOD. L. REV. 34 (1982).

157. See *supra* text accompanying notes 8-9.

158. See Calabresi, *supra* note 13, at 85.

159. See Fraser & Howarth, *supra* note 56, at 138, 166.

160. CAUSATION at lxxvii-lxxxii.

saying that it is unfair to hold people liable for things over which they had no personal control. But this is an argument not so much for causation as against strict liability. The second argument is that causation is an essential element in the idea of individual human agency, and thus in our view of ourselves as persons. On a practical level, this may overestimate the importance of lawyers' language, and the law in general, for everyday life. The lone benefit of lawyers' use of linguistic mystification is that it sets a limit to the juridification¹⁶¹ of everything. The *theoretical* consequences of these arguments remain to be settled. It would, at least, be surprising if the idea of personhood was consistent with only one idea of causation. Indeed, I doubt very much whether Hart and Honoré are looking for or would accept such a view. In outline, however, the argument is very powerful.

It is independently interesting to see *Causation in the Law* adapting just a little to the changes in intellectual fashion since 1959. It may be that Hart and Honoré have not kept up with these changes. Indeed they may not have wanted to keep up with what often seems, from the eastern side of the Atlantic, to be the obsession of United States torts theorists with superficially attractive simplifying arguments, which, after being denounced by the partisans of some other simplifying argument, seem inevitably to end up more complex than the material they set out to simplify.¹⁶² If, as I believe, there is an irreducible complexity in most important problems, then a strategy which accepts complexity from the start is more likely to avoid disaster than one which starts with impossible simplifications. But the cost of such a strategy is the inevitable disappointment for those who seek "breakthroughs."

When it first appeared, *Causation in the Law* was hailed both as a pioneering and a deeply conservative book. The second edition has a wider vision than the first, reaching even to the metaphysical level that is now approved Oxford philosophy. But it still refuses to follow fashion. Tort scholarship in the United States veers from one universal solvent to another (although they all seem to be coming from what, in European terms, is the far right these days), but just as Hart and Honoré refused to believe that the topic of their book was next to nothing, so they now refuse to believe that it is everything.

It may be that Hart and Honoré's particular proposals are open to objections at many points, but, as I hope I have illustrated, the upshot of these objections is not simplification but ever more complexity. In conse-

161. See, e.g., Clark, *The Juridification of Industrial Relations: A Review Article*, 14 *INDUS. L.J.* 69 (1985).

162. Epstein's epicycles in his subsequent articles provide a good example of this. See *supra* note 8 (citing articles).

quence, as they themselves conclude, it would be very foolish indeed either to build a great edifice of law and politics solely on foundations of causation, or to believe that causation can contribute nothing at all to the stability of those edifices that can be built. The authors' true contribution therefore lies not so much in their theorizing as in their attitude. They are trying to confront their topic in all its intricacy. They refuse to simplify just because the problem unsimplified is too hard for them. By referring to ordinary language and common sense they may ultimately do nothing more than repeat the problems. But at least the problems are stated. Their "common sense" is more than an outdated philosophical method. It is a refusal to systemize for the sake of systematizing, or to evade problems for the sake of some reductionist political program. In this sense, they advocate common sense not so much as a clever solution to a difficult puzzle but as a form of life.